

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-1664

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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RAYMOND ARGRO,

Appellee,

-against-

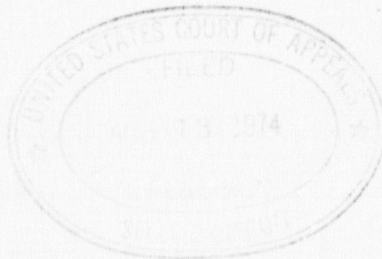
UNITED STATES OF AMERICA,

Appellant.
-----x

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P/S
Docket No. 74-1664

BRIEF FOR APPELLEE

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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QUESTION PRESENTED

Whether the appellee is entitled to a local parole
revocation hearing to determine both violation and disposition.

Preliminary Statement

This is an appeal by the Government from an order entered on March 4, 1974 of the United States District Court for the Eastern District of New York granting a writ of habeas corpus and releasing appellee on bail until such time as the United States Board of Parole held a local revocation hearing.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal.

Relevant Regulations

The United States Board of Parole promulgates rules which, in part, relate to the procedures for revocation of parole.

On August 9, 1972, the Chairman of the Board of Parole issued, in accordance with Morrissey v. Brewer, 408 U.S. 471 (June 29, 1972), a procedures memorandum (hereinafter referred to as the memorandum).* The memorandum states that at a preliminary interview,** made immediately after arrest, the alleged violator should be advised the interview will de-

*The memorandum is annexed as Exhibit A to appellee's brief.

**The preliminary interview, without the procedural safeguards now granted, was granted by Parole Board Rules prior to Morrissey v. Brewer, supra. See 28 C.F.R. §2.40 (1970).

termine whether he should be held for a revocation hearing and whether the hearing should be a local one. The memorandum also states that, at either a preliminary interview or a local hearing, the parolee is entitled to present documents or witnesses on his behalf, he might request adverse witnesses to appear, these witnesses can be cross-examined and that cross-examination can be denied for good cause. The memorandum however, limits the right to a local hearing and the right to confrontation and cross-examination at preliminary interviews and local hearings to those not convicted of crimes committed during the probation period:

An alleged violator is entitled to request that all adverse witnesses, including his supervising parole officer, be present at the preliminary interview as well as the local revocation hearing for confrontation and cross-examination. However, he is not entitled to this right if he has been convicted of a new offense or if he admits any of the alleged violations of his parole or mandatory release. Thus the criteria for confrontation and cross examination correspond exactly with the qualifications for a local revocation hearing.

On September 14, 1973, the Board of Parole issued revised Rules, which in relevant part read:

§2.43 Revocation by the Board

(a) A prisoner who is re-taken on a warrant issued by a Board Member shall be given a preliminary interview by an official designed by the Board. This preliminary interview shall be held prior to the possible return of the prisoner to a Federal institution. Following receipt of a summary or digest of the preliminary interview, the Board or a member thereof, unless he decides to reinstate the prisoner to parole or mandatory release supervision, shall give the prisoner an opportunity to appear at a revocation hearing before a hearing examiner panel designated by the Board.

(b) If the prisoner requests a local hearing prior to his return to a Federal institution, he shall be given a revocation hearing reasonably near the place of an alleged violation if the following conditions are met: (1) The local hearing would facilitate the production of witnesses or the retention of counsel; (2) the prisoner has not been convicted of a crime committed while under community supervision; and (3) the prisoner denies that he has violated any condition of his release. Otherwise, he shall be given a revocation hearing after he is returned to a Federal institution.

(c) Following the revocation hearing, parole or mandatory release may be reinstated, revoked, or the terms and conditions thereof may be modified. If the parole or mandatory release is revoked, the prisoner shall receive a written statement of the reasons for revocation and the evidence upon which the decision was based.

§ 2.44 Same; legal counsel and witnesses at preliminary interviews and revocation hearings.

(a) Each alleged parole or mandatory release violator shall be advised that he may be represented by counsel at the preliminary interview, the revocation hearing, or both, as authorized by §2.43, and that he may present documentary evidence and testimony of voluntary witnesses who have relevant and material information. The alleged violator must, however, arrange for the appearance of counsel and witnesses and presentation of documentary evidence. ...

(b) Such alleged violator shall be advised that if he is financially unable to retain counsel, he may make application to the United States District Court, which court may in its discretion appoint counsel to represent him if it finds that he is financially unable to retain counsel and that the interests of justice require appointment of counsel for

the preliminary interview or revocation hearing, or both.

(c) When the alleged violator has not been convicted of a new criminal offense while under supervision and does not admit violation of any of the conditions of his parole or mandatory release, the Board shall on request of the alleged violator or, on its own motion, ask adverse witnesses, i.e., persons whose testimony would support revocation, to attend the preliminary interview or the revocation hearing to permit cross-examination. However, such an adverse witness need not appear for confrontation and cross-examination if the hearing officer or examiner panel finds good cause for his nonappearance.

38 Fed. Reg. 184 at 26656
(Sept. 24, 1973).

On May 28, 1974, the Boards rules were again amended:

§2.52 Execution of warrant;
notice of alleged violations.

(c) If execution of the warrant is delayed pending disposition of local charges, for further investigation, or for some other purpose, the parolee or mandatory releasee is to be continued under supervision by the probation officer until the normal expiration of the sentence, or until the warrant is executed....

§2.53 Warrant placed as a
detainer and dispositional
interview.

(a) In those instances where the prisoner is serving a new sentence in an institution, the warrant may be placed there as a detainer. Such prisoner shall be advised that he may communicate with the Board relative to disposition of the warrant, and may request that it be withdrawn or executed so his violator term will run concurrently with the new sentence. Should further information be deemed necessary, the Regional Director may designate a hearing examiner panel to conduct a dispositional interview at the institution where the prisoner is confined. At such dispositional interview the prisoner may be represented by counsel of his own choice and may call witnesses in his own behalf, provided he bears their expenses. He shall be given timely notice of the dispositional interview and its procedure.

(b) Following the dispositional review the Regional Director may:

- (1) Let the detainer stand[;]
- (2) Withdraw the detainer and close the case if the expiration date has passed;
- (3) Withdraw the detainer and reinstate to supervision; thus permitting the federal sentence time to run uninterruptedly from the time of his

original release on parole or mandatory release.

(c) In all cases, including those where a dispositional interview is not conducted, the Board shall conduct annual reviews relative to the disposition of the warrant. These decisions will be made by the Regional Director. The Board shall request periodic reports from institution officials for its consideration.

§2.54 Revocation by the Board, preliminary interview.

(b) At the beginning of the preliminary interview, the hearing officer shall explain the Board's revocation procedure to the prisoner and shall advise the prisoner that he may have the preliminary interview postponed so that he may obtain representation by an attorney or may arrange for the attendance of witnesses. The prisoner shall also be advised that if he cannot afford to retain an attorney he may apply to a United States District Court for appointment of counsel to represent him at the preliminary interview and the revocation hearing. The prisoner may also request the presence of persons who have given information upon which revocation may be based. Such adverse witnesses shall be requested to attend the preliminary interview unless the prisoner admits a violation or has been convicted of a new offense committed while on supervision or unless the hearing

officer finds good cause for their non-attendance. At the preliminary interview the hearing officer shall review the violation charges with the prisoner, receive the statements of witnesses and documentary evidence on behalf of the prisoner, and allow cross-examination of those adverse witnesses in attendance.

(c) At the conclusion of the preliminary interview, the hearing officer shall prepare and submit to the Regional Director a summary of the interview, which shall include recommended findings of whether there is probable cause to hold the prisoner for a revocation hearing. Upon receipt of the summary of the preliminary interview, the Regional Director shall either order the prisoner reinstated to supervision, order that a revocation hearing be conducted in the locality of the charged violation(s), or direct that the prisoner be transferred to a Federal institution for a revocation hearing.

(d) The prisoner shall be retained in local custody pending completion of the preliminary interview, submission of the summary of the hearing officer, and notification by the Regional Director relative to further action.

§2.55 Local revocation hearing.

(a) If the prisoner requests a local revocation hearing prior to his return to a Federal institution, he shall be given a revocation hearing reasonably near the place of an alleged violation if the following conditions are met:

(1) The local hearing would facilitate the production of witnesses or the retention of counsel;

(2) The prisoner has not been convicted of a crime committed while under supervision; and

(3) The prisoner denies that he has violated any condition of his release. Otherwise, he shall be given a revocation hearing after he is returned to a Federal institution. However, the Regional Director may, on his own motion, designate a case for a local revocation hearing.

§2.56 Revocation hearing procedure.

(b) The purpose of the revocation hearing shall be to determine whether the prisoner has violated the conditions of his release and, if so, whether his parole or mandatory release should be revoked or reinstated.

(c) The alleged violator may present voluntary witnesses and documentary evidence in his behalf.

(d) If the alleged violator has not been convicted of a new criminal offense while under supervision and does not admit violation of any of the conditions of his release, the Board shall, on the request of the alleged violator or on its own motion, request the attendance of persons who have given statements upon which revocations may be based. Those adversary witnesses who are present shall be made available for questioning and cross-examination in the presence of the alleged violator....

39 Fed. Reg. 109 at 20038
(June 5, 1974).

Statement of Facts

A. Prior History

Appellee pleaded guilty to one count of a federal indictment charging bank robbery and on Feb. 28, 1967 was sentenced to a term of fifteen years imprisonment. On Nov. 23, 1970, appellee was released on parole pursuant to 18 U.S.C. §4208(a) and was supervised by the Probation Department of the Eastern District of New York (Petition for writ of habeas corpus*). After his release, he lived and was employed continuously in Nassau county (Petition for writ of habeas corpus) until his arrest on November 27, 1973, pursuant to a federal parole warrant.

B. The Parole Procedures

The parole warrant ** was issued on July 19, 1972 and charges possession of a dangerous drug, possession of a firearm, possession of a firearm without permission, association with a person engaged in criminal activity, and leaving the district without permission.

The State of New York charged appellee with possession of dangerous drugs on June 21, 1972, and released him on bail pending trial.*** On July 30, 1973, pursuant to a jury verdict

* The petition is Doc. No. 1 of the record on appeal

** The warrant is exhibit B to appellees brief

*** Letter to Judge Dooling attached to the petition for writ of habeas corpus.

of guilty rendered in the County Court of Broome County, appellee was sentenced to five years imprisonment. An appeal was then taken to the Appellate Division, Third Judicial Department, and appellee was continued on bail.

The federal parole warrant was executed on Nov. 27, 1973, when appellee was arrested at his place of employment while on bail pending appeal. Upon his arrest, appellee was taken to the United States Courthouse at Foley Square and was interviewed by Miss Greene of the Probation Department. According to Miss Greene, she was not in possession of the warrant at the time of the first interview, so she interviewed appellee a second time, on Nov. 29, 1973, after receipt of the warrant. The contents of the interviews were recorded by Miss Greene in a letter to her superior (See Parole Board Rules §2.43).*

At the first interview, appellee admitted his conviction, and his association with a person engaged in criminal activity but denied leaving the district without permission. He requested an institution hearing and court appointed counsel. There is no indication in the letter that appellee was advised of the purpose of the interview, the allegations of violation, the right to present witnesses or evidence, or of the right to counsel.**

According to Miss Greene, at the second interview conducted after receipt of the warrant, appellee read the warrant.

* The letter was government exhibit 3 for identification and is exhibit C to appellee's brief.

** Compare Parole Board Rule §2.44 (1973) (38 Fed. Reg. at 26656 (1973))

He was given a CJA Form 22 which advised him of his right to a revocation hearing and counsel and his right to contest the charges. He contested all five; requested a local revocation hearing and assigned counsel for the hearing.*

On the form 22, appellee acknowledged his conviction of a crime, but stated the case was on appeal.

According to Miss Greene, appellee made the following statement about the other alleged violations:

- 1) Appellee denied owning a gun. He indicated that a gun was found in his brother's house and that perhaps his brother told the police he (appellee) owned it.**
- 2) Appellee often visited his family in Binghamton with consent and knowledge of his parole officer. According to the appellee, on this occasion he left without permission but expected to get it on return.
- 3) Appellee stated he was friendly with Russell Caine, his co-defendant in the state proceedings, but was unaware of any criminal activity by Mr. Caine.***

On December 14, 1973, appellee was advised that he would be given a local hearing in January and counsel would be assigned.**** On December 18, 1973, appellee wrote to

* The form is exhibit D to appellees brief.

** In fact, the letter reflects that Miss Greene learned that appellee's brother had signed a deposition to that effect. There is no indication however, the appellee was told of this.

*** Mr. Caine died as a result of an auto accident in July, 1974

**** The notice is annexed as exhibit E to appellees brief.

the district court stating that he was still without counsel and that he had been advised that his revocation hearing was to take place not at the Federal House of Detention but at the Lewisburg Penitentiary.

As a result of this letter Judge Dooling assigned counsel and then ordered, on December 21, 1973, that appellee not be transported to Lewisburg.*

C. Appellee's Background

As revealed for the first time in the petition for writ of habeas corpus prepared by counsel for the district court, appellee, following his sentence on November 18, 1966 for armed bank robbery, to which he had pleaded guilty, was committed to the federal penitentiary at Terre Haute, Indiana. During the approximately four years he spent there, he completed his high school education and obtained three college credits at Indiana University. He learned the mechanic's trade and ultimately participated in a work release program through which he was able to send money home to his wife and children. He also involved himself in group therapy activities. Based on his record at Terre Haute, he was released on Nov. 23, 1970.

After about two months at home, during which time he was unable to find work, his wife abandoned appellee and their three children, after withdrawing all the savings and leaving the appellee to pay all their debts. Appellee found work as a mixer

* Doc. No. 5 to record on appeal

at the Nancee Paint Company in Farmingdale and, with the assistance of friends, was able to meet his obligations and care for the children. About a month later, he obtained a position as an auto mechanic at the Hillside Service Center in New Hyde Park and continued to be employed there or at other affiliated stations until he was arrested on the parole violation warrant on November 27, 1973. At the end of the school year of 1971, he sent his children to live with his sister in Richmond, Virginia and supported them regularly until his present incarceration. This support was accomplished by his paying regularly an amount into Court - he became legally separated from his wife in July, 1972 - and sending additional amounts of money when and as required.

He has been keeping company with Eugene Hudzinski, who is a technician in a laboratory. Their affection for each seems genuine and mature.

D. Arguments to the Court

Counsel for appellee argued to the district judge that a local revocation hearing was necessary to enable appellee to secure witnesses for the presentation of his case. Counsel argued that Morrissey v. Brewer, 408 U.S. 471 (1972), rendered invalid the Parole Board's rule precluding local hearings for those convicted of crimes, and by reference to United States v. Schreiber, 73 Civ 1830 (E.D.N.Y. Dec. 17, 1973), that the dispositional side of the revocation hearing was critical to the parolee and that bail was proper (Doc. No. 3 to record on appeal).

The government's response was simply to argue failure to exhaust administrative remedies and that bail was improper (Doc. No. 2 to record on appeal).

At oral argument, Judge Dooling was disturbed by the effect of the Parole Board's proceedings on the disposition of the case:

As soon as that appeal is determined, subject of course to the Court of Appeals, I guess in every circumstance - - once that is adjudicated that's the end. He's just going to lose the parole proceeding as a matter of law and the only question then will be a disposition What I am concerned about more than anything else is if they take him back to Lewisburg for the violation we know the outcome of that. It really would be a disposition hearing as well

Transcript of Jan.28,
1974 at 14-15.

His case is attended with all kinds of perplexities. What I was concerned about was we had begun to get into an impossible re-sentence situation as it were because at this time what the Board of Parole has to do is re-sentence because again we have an uncoordinated state and federal sentence and they just seem to work terribly cross-purpose that if you are in one jail and you get out you have to go to the other. It does all kinds of things to whatever programs, apparently are told by prisoners in both institutions - - both state and federal institutions - - that if you are in that situation all kinds of things happen to you. There are certain programs that you might enter, you do fine and all that, and then when you get out you have to do more time. That's the sort of situation he is in. I do not know what they can do except that I do know

that they have enormous power and they could designate the State Penitentiary as the place where he can serve part of his federal sentence or do something like that

Transcript of Jan. 28,
1974 at 17.

At the argument the government maintained that a local hearing was not permissible and that the preliminary interview here was valid.

F. Opinion and Decision of the Court

In his opinion of February 1, 1974, Judge Dooling concluded since the fact of the conviction is treated by the Board's Rules and the memorandum as determinative of the issue of violation, the conviction can be considered as final only after the appellate process is over. The appeal, he states, was especially significant where the state attests to the merits of the appeal by granting bail after an adversary hearing (opinion at 21).

Judge Dooling held that the pending appeal to the Appellate Division rendered the state conviction non-final, and that the preliminary interview should have been structured differently, and the Board should have delayed the proceeding pending the outcome of the appeal* or granted a local revoca-

* According to Judge Dooling, this would have been justified since the state released appellee on bail and he had been on parole for a year after the issuance of the warrant (opinion at 24-25).

tion hearing (opinion at 16-17).

The opinion recognized that the parole revocation proceeding is a three step process to determine probable cause to detain, violation and disposition.

In this view of the role of the revocation hearing, it is not apparent that interests of due process will in every case be adequately served by institutional hearing where, at least, the alleged parole violator is able to show that factors in mitigation can in his case best be demonstrated at a place nearer to his residence and work place during release, and nearer to the place of the alleged violation, provided no inordinate administrative inconvenience is imposed. Where, as may be the case here, the evidence in mitigation would very likely come from New York City, the center of a large metropolitan area, local parole hearings would not appear of necessity to impose any administrative burden. It might be hoped but it cannot be expected that the number of parole violation cases in the area will be too few to warrant regional hearings in this (and other) metropolitan centers.

Opinion at 23

When on March 4, 1974, the Board had not given appellee a local hearing and his appeal from the state conviction was promptly prosecuted, Judge Dooling found the detention unlawful and released him on bail pending the local hearing.

The government appealed from Judge Doolings order. On July 18, 1974, after the government filed its brief, the Appellate Division affirmed the State court conviction. Leave to appeal to the Court of Appeals has been filed.

POINT I

THE APPELLEE IS ENTITLED TO A
LOCAL PAROLE REVOCATION HEARING
TO DETERMINE BOTH VIOLATION AND
DISPOSITION.

Judge Dooling's final order of March 4, 1974 directed that the appellee be released on bail because the United States Board of Parole had not accorded him a local parole revocation hearing and was thus illegally detaining him. The Board's position was that the state conviction premised on activities occurring during the period of parole precluded such a hearing under the Board's Rules § 2.43(b). Judge Dooling concluded that the pendency of the appeal to the Appellate Division, Third Department, rendered the judgment non-final and that the release of appellee on bail demonstrated that the appeal was not frivolous and that therefore it should not be determinative of the issue of violation.

Judge Dooling was correct in concluding that an appeal renders the conviction non-final and makes a local hearing necessary. Further, as also held, the dispositional aspect of the revocation hearing requires a local hearing.

A. The pending appeal.

Judge Dooling found that a non-frivolous appeal, because of the possibility of reversal, could not determine the

fact of violation of parole. A view of the significance of an appeal to the criminal process amply justifies his interpretation of the word "conviction". The New York Court of Appeals has stated:

Our State has always regarded the right to appellate review in criminal matters an integral part of our judicial system and treated it as such. Since long before the Supreme Court's pronouncement (Griffin v. Illinois, 351 U.S. 12), it has been the consistent policy of our courts to preserve and promote that right as an effective, if imperfect, safeguard against impropriety or error in the trial of causes. This policy has been particularly manifest on a number of occasions where the failure to provide sufficiently comprehensive reports of the proceedings at the initial stage of litigation threatened to render nugatory the right to appeal [Citations omitted] In the instances cited the lower courts had failed to make and preserve an adequate record of the proceedings at the trial level. Unequivocally and with emphasis upon the importance and fundamental nature of the right to appellate review, the courts on each occasion held that the making of such a record and its availability to defendant-appellant were absolute requisites and concomitants of the right to review....

People v. Pride, 3 N.Y. 2d 545 (1958).

Griffin v. Illinois, 351 U.S. 12, 18 (1956), expresses the same thought:

Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant.... All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence. Statistics show that a substantial proportion of criminal convictions are reversed by state appellate courts.[*]

The significance of the appeal is of course also related to the issues. Here, the primary issue was whether the state established the necessary quantity of drugs to establish a felony under the New York statute. To do this, the State had sample envelopes containing the drug tested to determine the contents. At trial, the chemist simply calculated the total amount of drug by multiplying. The Appellate Division, Third Department, indicated the significance of the issue by releasing appellee on bail (See N. Y. Penal Law §510.30 (2)(a) and (b) and Judge Dooling's opinion at 21).

*Statistics for 1973 collected by The Legal Aid Society of New York City about the disposition of cases handled by its Appeals Bureau show that of fifty-one cases handled in the Court of Appeals, seventeen were reversed; of two hundred fifty cases handled in the Appellate Division, First Department, twenty-one were reversed or modified, and of three hundred forty cases in the Second Department, forty-eight were reversed or modified.

Since there was a possibility of reversal which would have required the Board to hold a hearing on the issue of violation, a local hearing was required and Judge Dooling is correct.*

On July 18, 1974, after the Government filed its brief, the Appellate Division affirmed the judgment of the State trial court. Thereafter an application for leave to the Court of Appeals and for bail was filed. Undoubtedly, the Government will argue that the discretionary appeal does not come within the terms of Judge Dooling's opinion and that no local hearing is necessary. To that, it need only be said that Judge Dooling's opinion makes no distinction between an appeal as of right and a discretionary appeal. Indeed, at oral argument on the petition he stated that the appellate process includes the process before the Court of Appeals. This result is correct. New York makes no distinction between the two appeals. Rules of the Third, as well as of the First and Second Departments, require that appellate counsel, whether retained or assigned, make a leave application after an affirmance of a judgment by the Appellate Division

*The Government argues that despite a reversal the Board might still revoke parole (Brief at 7-8). This is correct but beside the point. If the conviction were reversed, the parolee would be entitled to a local hearing so that the Board could determine the fact of violation.

if the client requests it.*

Further, recent decisions of the New York State Court of Appeals have indicated that, in the wake of the newly enacted State drug laws and the harsh sentences included, the Court is likely to examine or re-examine evidentiary and other issues that may arise consistently in prosecutions for violation of the drug laws. E.g. People v. Connelly, (Court of Appeals, July 15, 1974 (Wachler, J.)). Thus, the possibility of the grant of leave to appeal here is substantial.

Judge Dooling also found as justification for his decision the impact on the parolee's rights of the fact of a conviction, and concluded that the severity of the deprivations incurred necessitated finality of the conviction.

*Ross v. Moffitt, 42 U.S.L.W. 4940 (Sup. Ct. June 17, 1974), permits the states to make a distinction between appeals as of right and discretionary appeals for purposes of assigning counsel. However, New York makes no such distinction. The significance of the discretionary appeal in the New York process is manifested by the right to an oral hearing before a judge of the court who examines the briefs that were before the Appellate Division.

According to statistics of The Legal Aid Society concerning its cases, the Court of Appeals denied two hundred ten leave applications and granted approximately fifty.

He examined at length the Board's Rules and the memorandum and concluded that they denied or limited the rights of a parolee convicted of a crime as articulated by Morrissey v. Brewer, supra, 408 U.S. at 485. Morrissey states that parolee should be given notice of the preliminary hearing and told that its purpose is to determine whether there is probable cause to believe that he has committed a violation. The notice must state the alleged violations. At the hearing, the parolee may appear, speak on his own behalf, and bring letters, documents or individuals who can give relevant information. A person with adverse information on which revocation is to be based must, on request of the parolee, be made available for questioning in the parolee's presence unless the parole officer believes there is a risk of harm. The hearing examiner must make a summary of the parolee's responses, evidence and position. The officer must then make his finding giving the reasons and evidentiary basis for the conclusion. Morrissey v. Brewer, supra, 408 U.S. at 487.

As for the revocation hearing, the Supreme Court stated it:

... must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation. The parolee

must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation.... The minimum requirements of due process include

(a) written notice of the claimed violations of parole;

(b) Disclosure to the parolee of evidence against him;

(c) Opportunity to be heard in person and to present witnesses and documentary evidence;

(d). the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);

(e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and

(f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Id. at 488-9.

Although the question of whether counsel had to be made available was left open in Morrissey, In Gagnon v. Scarpelli, 411 U.S. 778 (1974), the Court held that counsel

could be provided depending on the circumstances.

Morrissey does not preclude any category of violator from receiving procedural attributes of the preliminary or the final revocation hearing. The only limitation placed on these proceedings is that previously determined issues, such as a criminal conviction, not be relitigated.

Without support from Morrissey, the memorandum and Parole Board Rules in effect at the time of the parole proceedings here did work a substantial limitation on the parolee's rights if he was convicted of a crime. Under the memorandum and §2.44(c) of the Board's 1973 Rules he was not permitted to hear adverse witnesses or to confront or cross-examine them either at the preliminary interview or the revocation hearing (38 Fed. Reg. 184 at 26656, or supra at 6). Under § 2.43 (b) of the Board's Rules (38 Fed. Reg. 184 at 26656 or supra at 4) he was not entitled to a local revocation hearing, thus making it difficult, if not impossible for the parolee to secure witnesses or documents for the dispositional aspect of the hearing which, according to §2.44(a) the parolee must do himself.

In fact, as Judge Dooling found, the preliminary interview granted here was woefully defective even under the Board's Rules. Although appellee was interviewed on

two occasions, he did not have counsel at either time. It does not appear that he was advised of his right to counsel at the interview, or of his right to present anything in mitigation. Thus, he was precluded from explaining or having counsel explain the significance of the pending state appeal and of his release on bail pending appeal. Further, the appellee was not advised of the basis for the conclusion or shown the summary report.

Since the Board has singled out a category of people for unique treatment resulting in serious deprivation, Judge Dooling was correct in narrowly construing the language of the rule to require completion of the criminal process.*

In the face of these deprivations, worked by the Board in violation of Morrissey, Judge Dooling properly concluded that the conviction "must put guilt and therefore parole violation beyond question" (op. at 16).

*His alternative was to hold the rule invalid, which of course, he properly tried to avoid.

B. The dispositional side of the revocation hearing.

Judge Dooling stated in his opinion the second basis for granting a local hearing:

In this view of the role of the revocation hearing, it is not apparent that interests of due process will in every case be adequately served by institutional hearing where, at least, the alleged parole violator is able to show that factors in mitigation can in his case best be demonstrated at a place nearer to his residence and work place during release, and nearer to the place of the alleged violation, provided no inordinate administrative inconvenience is imposed. Where, as may be the case here, the evidence in mitigation would very likely come from New York City; the center of a large metropolitan area, local parole hearings would not appear of necessity to impose any administrative burden. It might be hoped but it cannot be expected that the number of parole violation cases in the area will be too few to warrant regional hearings in this (and other) metropolitan centers.

Judge Dooling's position is amply justified by Morrissey v. Brewer, supra:

If it is determined that the parolee did violate the conditions ... the second question

arise[s]: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation? The first step is relatively simple; the second step is more complex. The second question involves the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without committing anti-social acts. This part of the decision, too, depends on facts, and therefore it is important for the board to know not only that some violation was committed but also to know accurately how many and how serious the violations were. Yet this second step, deciding what to do about the violation once it is identified, is not purely factual but also predictive and discretionary.

408 U.S. at 480.

The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation.

408 U.S. at 483.

See also Gagnon v. Scarpelli, supra.

The federal courts have been no less cognizant of the significance of this aspect of the proceeding. The courts have recognized that violation alone may not require revoca-

tion, that the parolee must have an opportunity to present mitigating circumstances and the refusal to provide the opportunity to present such circumstances is a violation of due process. Preston v. Priggman, 496 F.2d 270, 274 (6th Cir. 1974); Caton v. Smith, 486 F.2d 733, 735 (7th Cir. 1973). The need for evidence on the issue of disposition is even necessary if there has been an intervening conviction. The Eighth Circuit, in holding invalid a decision to delay a parole revocation hearing until service of the intervening sentence is completed, stated:

It is possible to argue (1) that a revocation hearing is needless since in most every case the detainer request will be placed because the petitioner has violated his parole through conviction of another felony....

[This] consideration could be a real one, if it were a foregone conclusion that revocation and reincarceration would always result. However, this is not so. There are many possible alternatives. First, notwithstanding the conviction in another state, the Board of Parole may well waive revocation. This often occurs today but the decision to waive revocation is not decided until the prisoner is about to be released by the detainer state. The

result is that because of the detainer, the prisoner is released without having been given the opportunity for rehabilitation in prison.

Second, the argument that parole revocation and imprisonment will automatically follow upon release overlooks the concern of the Supreme Court "that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving...."

Cooper v. Lockhart, 489 F.2d 308, 315-16 (8th Cir. 1973).

Like the Court in Cooper, the District Court of the District of Columbia has made clear that even where there is a conviction, mitigating circumstances and rehabilitative potential are necessary to determine disposition and the revocation hearing cannot be delayed until after the service of the sentence imposed pursuant to a conviction resulting from crimes committed during the parole period. Jones v. Johnston, 368 F.Supp. 571 (D.D.C. 1974);* Sutherland v. District of Columbia Board of Parole, 366 F.Supp. (D.D.C. 1974):

*Jones expressly found that the portion of an earlier decision of the D. C. Circuit, Shelton v. United States, 388 F.2d 561 (1967), holding that it was not necessary to grant an immediate hearing to those convicted of a crime committed during the probation period was overruled by Morrissey v. Brewer, supra.

The Board must consider mitigating circumstances and rehabilitative potential as well as the existence of parole violations before determining that reincarceration is appropriate. Cf. United States ex rel. Hitchcock v. Kenton, 256 F.Supp. 296 (D.Conn.1966). Thus, a revocation hearing to adduce evidence on these matters is of vital importance even to a parolee whose parole violation has already been established by a court of law. Moreover, delay in holding the hearing could substantially prejudice such a parolee. Not only might mitigating evidence be lost during the years of intervening incarceration, see Jenkins v. United States, 337 F.Supp. 1368 (D.Conn.1972), but the parolee could be arbitrarily deprived of the opportunity to have his reincarceration, if ordered, run concurrently with the remainder of his intervening sentence. The maintenance of a detainer against an inmate whose parole will never actually be revoked has other undesirable effects, triggering an unnecessary loss of prison privileges and hampering rehabilitation by placing the parolee's future into a state of prolonged uncertainty.

Id. at 272.

Jones refers to the cases of this Circuit which have recognized the importance of the dispositional part of the hearing and have required a speedy disposition in a fair proceeding even if there was an admission of a crime which

constituted the violation. Significantly, these decisions antedate Morrissey. United States ex rel Hitchcock v. Kenton, 256 F.Supp. 296 (D. Conn. 1966); United States ex rel. Vance v. Kenton, 252 F.Supp. 344 (D. Conn. 1966):

[T]he petitioner's admission of violation [is not] an extenuating circumstance which, as the respondent argues, excuses the delay. Whether or not there has been a transgression is only the first of two decisions which must be reached following a Section 4207 hearing. Loss of parole status and reincarceration are not automatic consequences of parole infraction. The statute also requires the Board to determine whether the violator is still a good parole risk. A breach of the release conditions is but one element, albeit often a forceful one, to be considered. The parolee may bring other factors to the attention of the Board which may induce it to give him another chance. [Citations omitted].

An accused violator, therefore, should be presented within a reasonable time not only to respond to the charges against him, United States ex rel. McCreary v. Kenton, 190 F.Supp 689, 691 (D.Conn.1960), but also to attempt to convince the Board that, notwithstanding the violation, his parole should be continued under the same or some other terms and conditions. Months of incarceration prior to hearing, in addition to being fundamentally unfair, effectively nullify this opportunity.

Id. at 346.

See also Jenkins v. United States, 337 F.Supp. 1368 (D. Conn. 1972).

The incorrectness of the Government's argument that the fact of conviction resolves the issue here is obvious in face of this precedent. Since a local hearing enables or facilitates the parolee violator's right to present evidence -- either documentary or testimonial --* at the revocation hearing, and since the dispositional part of the hearing is critical to process, the parolee convicted of a crime is denied due process if he is deprived of a local hearing. There is no justifiable basis for classifying this group of parolees different from others for the fact of the crime is not determinative of the issue of revocation. Further, if due to his indigence, the violator cannot produce his witnesses at an institutional proceeding, he is denied equal protection.

The Board has apparently recognized that Rule § 2.43 (b) as it existed at the time of the proceedings was of doubtful validity. On May 28, 1974 that section, promulgated as §2.55(a) was amended to permit the regional director to authorize a local hearing even when the violation is a crime.

*In Mainer v. Attorney General, 429 F.2d 389 (5th Cir. 1970), a pre-Morrissey decision, the Court held that a local hearing was not necessary where the fact of violation was incontroverted because the parolee could not be benefited. The reasoning and conclusion are both wrong, and the case must be considered invalid in the fact of subsequent precedent.

The Government's reliance on that part of Morrissey that states that the facts of conviction is not to be re-litigated (Government brief at 9) does not affect the need for a local hearing for at such a hearing the parolee would not be relitigating violation, but disposition. Further, the only cases cited by the Government in support of its position are Burnett v. United States Board of Parole, 491 F.2d 967 (5th Cir. 1974) and Cook v. Attorney General, 488 F.2d 667 (5th Cir. 1974). Contrary to all other cases, these Fifth Circuit decisions permit the Board to wait until after service of the sentence imposed for the crime committed while on parole before making a disposition. That court finds no prejudice in the inability of the Board to dispose of the matter by imposition of a concurrent sentence.

The reasoning is, as demonstrated, universally rejected. Concurrent sentences are a possible method of disposition, but the failure to conduct an immediate hearing precludes that possibility forever. What is more, in this case the appellee demonstrated that he could present mitigating circumstances with respect to each alleged violation. In addition, his employment and family background present additional factors in mitigation. The Parole Board itself, has articulated its power to impose concurrent sentences in

the May 28, 1974 revision of the Rules (See supra at 6). The procedure for conducting hearings in state prisons to determine whether concurrent sentences should be imposed is also outlined.*

The Government argues that all Morrissey requires is a local preliminary hearing for the purposes of determining probable cause. However, as the District Court found the rules of the Board and the memo demonstrate that a person convicted of a crime committed during the parole period has seriously curtailed rights at the preliminary hearing and as the Judge found, other rights were curtailed here. The primary prejudice that accrued to appellee was that he had no counsel for the interview nor was a court given the opportunity to rule on the issue until after the interview was over and the Board had refused to give a local hearing. Thus, the preliminary hearing was not in accord with the Board's own rules.

Further, now that a local hearing is considered by the Board to be a matter of discretion, the presence of counsel at the preliminary interview is critical for articulating the reasons for a local hearing. Here, of course,

*In light of the precedents discussed, § 2.53 (c) (1974), which permits a delay in this disposition, is of questionable validity.

after his appointment by the district court, counsel was able to demonstrate why there was a delay in prosecuting the state appeal and in accelerating these proceedings. Counsel was also able to muster the necessary facts about appellee's personal life. In this and in other cases, counsel will be able, after conference with state prison officials, to explain what rehabilitative advantages would be available and why a concurrent sentence would be most beneficial.

Gagnon v. Scarpelli, supra, 411 U.S. at 790.

In this case, it seems absurd for the Government to be demanding an institution disposition. Appellee already has counsel who is not only fully conversant with his case, but who is affiliated with an agency fully capable of undertaking to represent him.

C. The Release of appellee on bail was proper.

Appellee was retaken on November 27, 1973. On March 4, 1974, the Court issued the writ and ordered appellee's release on bail in the face of what was apparently a continuing refusal by the Board to grant a local hearing. In light of Judge Dooling's opinion holding that appellee had a right to a local hearing, the Board's continuing refusal to act makes the detention of appellee illegal. In

these circumstances, the Court had the power to order release of the appellee and thus certainly some lesser form of relief such as release on bail. United States ex rel. Buono v. Kenton, 287 F.2d 534, 536 (2d Cir. 1961); United States ex rel. Thorne v. Warden, 72 Civ. 1372 (E.D.N.Y. Order of February 19, 1973), appeal dismissed as moot, F.2d (2d Cir. 1973), United States ex rel. Hitchcock v. Kenton, supra.

To argue that this relief is not within the court's power fails to recognize the scope of relief which can be granted pursuant to 28 U.S.C. §2243. Even under the now repudiated restrictive view of the relief available under the statute, "discharge of the prisoner or his admission to bail" was authorized. Parker v. Ellis, 362 U.S. 574 (1960); McNally v. Hill, 293 U.S. 131 (1935). Both McNally and Parker have been overruled by decisions in which the Supreme Court has found unacceptable the limited view of the relief available pursuant to habeas corpus and which greatly expand the relief which can be fashioned under §2243. Carafas v. LaVallee, 391 U.S. 234 (1968); Peyton v. Rowe, 391 U.S. 54 (1968). Thus, in Peyton, where the Court assumed the availability of release unconditionally or on bail, it was said:

[The holding in McNally] rested in part on the premise that physical discharge from custody

is the only relief available in a habeas corpus proceeding. But the statute does not deny the federal courts power to fashion appropriate relief other than immediate release. Since 1874 the habeas corpus statute has directed the courts to determine the facts and dispose of the case summarily 'as law and justice require.'

The constitutional issue here, is not one of bail, but whether appellee was denied his right to a local hearing. That issue would be the same whether or not appellee was released on bail.

Furthermore, on a finding of constitutional violation, the federal court can grant unconditional release on bail to be posted pending an appeal by the Government or pending appropriate Government action. See, e.g., United States ex rel. Collins v. Clandy, 204 F.2d 624 (3rd Cir.), cert. denied, 343 U.S. 954 (1952); O'Brien v. Lindsey, 202 F.2d 418 (5th Cir. 1953); Garten v. Stahl, 337 F. Supp. 1045 (W.D.N.Car. 1972); Colson v. Johnson, 35 F.Supp. 317 (N.D.Cal. 1940).

CONCLUSION

For the above-stated reasons the order below should be affirmed.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
606 United States Court House
Foley Square
New York, New York 10007

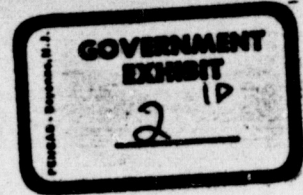
PHYLIS SKLOOT BAMBERGER,

Of Counsel

August 12, 1974

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

SUPREME COURT BUILDING
WASHINGTON, D.C. 20544



ROWLAND F. KIRKS
DIRECTOR

JOSEPH F. SPANIOL, JR.
ASSISTANT DIRECTOR
FOR LEGAL AFFAIRS

WILLIAM E. FOLEY
DEPUTY DIRECTOR

August 18, 1972

MEMORANDUM TO ALL UNITED STATES DISTRICT JUDGES,
UNITED STATES MAGISTRATES AND PROBATION OFFICERS

Attached for your consideration is a copy of a memorandum received from the Chairman of the U. S. Board of Parole setting forth new procedures following arrest of parolees and mandatory releasees on Parole Board warrants.

As you will note the preliminary interview of an alleged violator following arrest must be conducted by a probation officer other than the one who has been supervising the violator and who has recommended the warrant. If there is no such officer available to conduct the interview the Parole Board suggests that the required interview be conducted by a United States Magistrate, if authorized by the court to do so.

Normally, these procedures should not cause any problem. In one man probation offices, however, it may be necessary for a magistrate to conduct the necessary interview from time to time. We suggest that you consider the advisability of your court authorizing its magistrates to perform this function.

Sincerely yours,

William E. Foley
William E. Foley
Deputy Director

Attachment


UNITED STATES GOVERNMENT

DEPARTMENT OF JUSTICE

Memorandum

TO : Wayne P. Jackson, Chief
Division of Probation
Administrative Office of the U. S. Courts

DATE: August 9, 1972

FROM:  Maurice H. Sigler, Chairman
U. S. Board of Parole

SUBJECT: New procedures following arrest of parolees and
mandatory releasees on Parole Board Warrants

In accordance with the opinion of the United States Supreme Court in Morrissey v. Brewer, No. 71-5103, decided June 29, 1972, the following new procedures with respect to persons arrested on Parole Board Warrants should be implemented immediately by all United States Probation Officers. Accordingly, we request dissemination of this memorandum to all Probation Officers at your earliest convenience.

(1) The preliminary interview will be conducted in the same manner as heretofore, including furnishing to the alleged parole or mandatory release violator of forms F-2, to determine the matter of local versus institutional hearing, and the C.J.A. Form, to determine the question of whether the alleged violator wishes to request appointment of counsel. This preliminary interview, however, must be conducted by a Probation Officer other than the one who had been supervising the alleged violator, and who has recommended the warrant. If it is impossible to use another

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Probation Officer to conduct this interview, such interview could be conducted by a United States Magistrate, if the United States District Court authorizes such; if so, the Magistrate should be carefully instructed by the Chief United States Probation Officer, or someone appointed by him for the purpose, in the nature of the preliminary interview.

(2) The alleged violator should be advised by the person conducting the preliminary interview that the preliminary interview will determine whether he should be held for a revocation hearing, and if so, whether such hearing should be held locally or in the institution from which he was released. These determinations will be made pursuant to a summary of the interview, and a recommendation, which will be forwarded by the interviewer to Parole Headquarters at Washington.

(3) The alleged violator should be further advised that if he has not been convicted of a new criminal offense while on supervision, and if he also denies all of the charges of violation, he is entitled to bring to the preliminary interview documents or witnesses in his behalf.

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Further, he may request that the Probation Officer (or the Magistrate) ask adverse witnesses, including his supervising Probation Officer whose testimony would favor revocation, to appear at the hearing. The witnesses would then be available for cross examination. The Probation Service and the Parole Board (or a Magistrate holding a preliminary interview for the Board) can only request witnesses to appear; the Board does not have subpoena power to enforce attendance. Of course United States Probation Officers would attend as witnesses on request. He should also be advised that if the interviewer finds good cause for not permitting such confrontation of any witness, he may refuse the request to endeavor to obtain the presence of such witness for cross examination.

(4) The summary mentioned in (2) above should include the substance of the documents and evidence (a) in support of revocation and (b) in support of the parolee's position. The recommendation should include the reasons and evidence which support it.

(5) If the new rights, outlined above, should be requested by the alleged violator, such as bringing his

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witnesses or documents or requesting confrontation and cross examination of adverse witnesses, it could cause a postponement of the preliminary interview. If such a postponement should make it possible to have present all materials and persons requested, including, e.g., retained or appointed counsel, if any, this postponed preliminary interview could then be conducted as a revocation hearing, by an examiner designated by the Board, provided that arranging for an examiner's presence does not cause further delay in the hearing.

(6) At all local revocation hearings the evidence against alleged violators will be disclosed to them, and they will be permitted cross examination of any adverse witnesses who may appear at the hearings.

(7) If the alleged violator is entitled to a local hearing, but does not wish to cross examine or bring his own evidence to the preliminary interview, but rather wishes to request confrontation and cross examination at a local revocation hearing, he can so advise the interviewer or Probation Officer. The Probation Officer after the preliminary interview will then be in a position

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to immediately send in his summary and recommendation .
and a regular local revocation hearing will be arranged.

In summary the new rights entailed in the above procedures
consist of the following:

(a) All interviews of alleged violators must be
conducted by a Probation Officer other than the Officer who had
been supervising him. If necessary a United States Magistrate can
be used for this purpose with the District Court's authorization.

(b) An alleged violator is entitled to request that
all adverse witnesses, including his supervising parole officer,
be present at the preliminary interview as well as the local
revocation hearing for confrontation and cross examination.
However, he is not entitled to this right if he has been convicted
of a new offense or if he admits any of the alleged violations of
his parole or mandatory release. Thus the criteria for confronta-
tion and cross examination correspond exactly with the qualifications
for a local revocation hearing.

The Probation Officer, or other interviewer, will not
request the presence of adverse witnesses for cross examination,
if such interviewer finds that it will be dangerous for such

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witnesses to appear, or if he finds other good cause for denying such a request. If such "other good cause" is believed to exist, this should be discussed with the Parole Executive, who will consult Legal Counsel for the Board.

(c) It should be noted that our present procedures as outlined in Form F-2 permit a person who is entitled to a local hearing (by reason of not having been convicted of a new offense and denial of all charges of violation) to nevertheless waive his local hearing in favor of a revocation hearing at the penitentiary. Alleged violators must be advised that this option will no longer be open to them unless they wish to waive their right to request confrontation and cross examination of adverse witnesses. In other words, confrontation and cross examination of adverse witnesses can be had only at a local hearing.

Any questions concerning arrangements for postponed preliminary interviews which are conducted as local revocation hearings should immediately be referred to the appropriate Parole Executive.

UNITED STATES DEPARTMENT OF JUSTICE
United States Board of Parole
Washington

WARRANT APPLICATION

TO: United States Board of Parole.

Date July 12, 1972

Case of Raymond Argo

Reg. No. 24577-132

Race Black Birth Date December 22, 1941 FBI No. 605 522

Sentence 15 years District from Eastern/ New York

Original offense Bank Robbery (A-2)

Sentence began November 19, 1956 Released November 23, 1970

District to Eastern/ New York Transferred to M.R. Parole

Violation date on or about Nov. 20, 1972 Termination date June 27, 1981

A United States Probation Officer will interview persons designated by the alleged violator and record a summary or digest of their statements bearing on the alleged violation.

Charges:

1. Criminal Possession of a Dangerous Weapon
✓ On June 21, 1972, Argo was arrested by the Binghamton, New York Police Department and charged as above. He was remanded to Broome County Jail on bond of \$15,000 cash or \$20,000 property bail. Disposition is pending.
2. Possession of a Weapon
✓ On or about July 29, 1972, a complaint was filed with the Binghamton City Judge charging that during the month of February, 1972, Argo possessed a automatic Beretta .22 caliber pistol. Disposition is pending.
3. Unauthorized Possession of a Weapon
✓ Argo did not have permission of the U.S. Probation Officer to possess a Beretta pistol as charged nor a firearm of any type.
4. Association with Person Engaged in Criminal Activity
✓ Associated with Argo on June 21, 1972, was Russell W. Cain.
5. Leave District Without Permission
✓ Argo did not have the permission of the U.S. Probation Officer to leave the Eastern District of New York and travel to the Northern District of New York where he was arrested on June 21, 1972.

Date Warrant Issued July 12, 1972

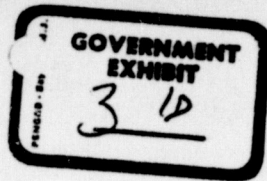
Warrant recommended by:

District to which sent Eastern/ New York

James D. Dick
Parole/Youth Division Executive

PRISONER'S COPY

ONLY COPY AVAILABLE



Re: Argo Raymond
Reg. No. 24577-138
Warrant issued 7/19/72

Mr. James R. Pace
Parole Executive
United States Board of Parole
101 Indiana Ave NW
Washington, D.C.

Dear Mr. Pace

Reference is made to the above
named parolee on whom a
violation's warrant was issued
on July 19, 1972 for being arrested
for possession of a dangerous drug,
unauthorized possession of a
weapon, association with a
person engaged in criminal
activity and leaving the district
without permission.

Even though the warrant
was issued on 7/19/72 it was
sent to the Marshal in New York
on 7/20/72.

After the warrant was
issued on 7/19/72 it was sent
to the U.S. Marshal in New York
with instructions to
place a detainer on the
prisoner it was believed.

the parolee was incarcerated. However, the parolee was not sent to Utica as he appealed his conviction in Binghamton, N.Y. & was released on \$5,000. The warrant was therefore held in abeyance and ~~executed~~ on 11/27/73, when the parolee was arrested at his place of employment. On the same date, we interviewed the parolee in the Marshal's Detention Pen in this District. At this time we were not in physical possession of the warrant as it was still in Utica, N.Y. The parolee admitted his conviction in Binghamton, N.Y. & his association with a person engaged in criminal activity, but denied leaving the District without permission. The parolee then executed Parole form F2, on which he indicated a desire that his revocation hearing be held at a federal institution. He also executed the CSA form 2.2 on which he indicated that he desired District Court appointment of counsel in his revocation hearing.

On 11/29/73 we received a copy of the warrant & noted that it included two additional charges which we had not discussed with the parolee. Therefore we reinterviewed the parolee on the above named date. At this time after the parolee read the warrant application he denied all five charges & changed Parole Form F-2 in which he asked for a local revocation hearing.

~~The parolee stated that he had to deny all five charges.~~

The parolee denied the five alleged violations with the following remarks. With respect to criminal possession of a dangerous drug, the parolee admitted that he was arrested in Binghamton N.Y. on 6/21/72 and was convicted 6/21/73 but stated that since his case is under appeal he should not have been punished on this charge until after a decision was rendered on his appeal. With respect to possession of a weapon & unauthorized possession

before

upon, the parolee denied that he ever owned a gun. He advised that in Feb 1972 local authorities found a gun in his brother's house & that it was possible that his brother advised police that he owned the gun. Case record entries indicated that in Feb 1972 a .22 caliber gun was found in the parolee's brother's home and on May 29, 1972 the parolee's brother signed a deposition stating that the parolee was the owner of the gun in question. With regards to associating with a person involved in criminal activity the parolee stated that he was unaware of Cain's prior arrest record until 6/21/72 when they were both arrested. Finally, with respect to leaving the institution without permission, the parolee stated that his Probation Officer gave him approval to travel to Binghamton, N.Y. where he was arrested on 6/21/72. Case record entries indicated that the defendant's request had requested & was granted approval* to travel to Binghamton, N.Y. but that he did not request approval to travel to Binghamton or

*on specific occasions

June 21, 1972 at the time of his
arrest.

Enclosed please find form F-2.
By copies of this letter, and provide
form F-2 we are notifying the
Federal Reformatory, Allenwood,
Pennsylvania, & Federal
Detention Headquarters, New York
City of the present circumstances.
~~Similarly~~ Similarly, a copy of
this letter, together with a
covering letter & C.S.A. form 22
is being forwarded to the Clerk
of the Court for the Southern District
of New York for the appointment
of Counsel.

Please be assured of our
continued desire to cooperate

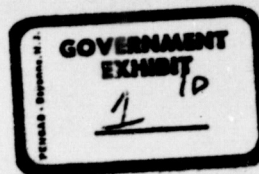
VTY

BFG

~~cc:~~

cc: Federal Detention Headquarters,
Clerk of Court Southern District NY
Federal Reformatory, Allenwood, Penn

CJA FORM 22
(Feb. 1971)



UNITED STATES DISTRICT COURT

for the

Southern district of New York

In the Matter of Statement of
(Parolee

Raymond Arico (Mandatory Releasee, concerning

Appointment of Counsel under the Criminal Justice Act

Register No. 24572-138

U. S. Court Docket No. _____

Statement of Parolee or Mandatory Releasee
Concerning Appointment of
Counsel under the Criminal Justice Act

I, Raymond Arico, being under arrest for
alleged violation of parole) at New York, N.Y.
mandatory release)

acknowledge the following to be true and correct:

That I have been fully advised by United States
Probation Officer B.F. Greene that I am charged
with a parole) violation or violations as set
Mandatory release)
forth in the attached copy of Application for Warrant,
which has been read to me;

That United States Probation Officer B.F. Greene
has fully explained to me that I may be afforded a revoca-
tion hearing by the United States Board of Parole either

locally near the place of my alleged violation at _____, or upon my return to a Federal institution;

That I have requested that the hearing be held

_____ locally;)

_____ at a Federal institution;)

That United States Probation Officer B. F. Green

has advised me that I may apply to the United States District Court for appointment of counsel to represent me at my revocation hearing before a representative of the United States Board of Parole, and that such representation by counsel will be furnished to me if the United States Magistrate or the Court determines that the interests of justice so require and if the United States Magistrate or the Court also determines that I am financially unable to obtain attorney representation;

Pursuant to such notification concerning appointment of counsel,

1. _____ I do not wish to apply to the District Court for appointment of counsel to represent me in my revocation hearing.

2. _____ I wish to apply to the District Court for appointment of counsel in my revocation hearing and in connection with this application I state as follows:

A. Concerning the numbered charges on the United States Board of Parole warrant application attached hereto, I wish to contest the following:

Charge Number:

Charges 1, 2, 3, 4 + 5

List in left column all charges you wish to contest, identifying each charge by the number corresponding to the number on the warrant application.

I do not contest the following:

List in left column all charges you do not contest, identifying each such charge by the number corresponding to the number on the warrant application.

B. I [have] ~~[have not]~~ been convicted of an offense since my release. If convicted:

1. State the charge:

Possession of Dangerous Drugs

2. State the place of conviction:

Binghamton N.Y.

Case is
under appeal

C. In applying for appointment of counsel I make the following statement to the court concerning my financial condition:

I am Employed ☒ Unemployed ☐

If employed, state weekly income \$ 1.35 *net*

If self-employed, state average weekly income \$

Cash on hand and in bank \$ 00

Number of dependents 4

Property owned: None

(CURRENTLY DETAINED AT FEDERAL DETENTION
HEADQUARTERS AND WITHOUT FUNDS)

I certify the above to be correct.

James C. [Signature]
(Signature of Applicant)

Witness:

✓ *Beverly F. [Signature]*
United States Probation Officer

Date: 11/29/73

A false or dishonest answer to a question in this application may be punishable by fine or imprisonment or both, (18 U.S.C. 1001).

UNITED STATES DEPARTMENT OF JUSTICE
United States Board of Parole
Washington, D.C. 20537



NOTICE OF PAROLE CONSIDERATION HEARING

TO:

You are hereby notified that a hearing in your case will be held during the week of January 1954, 1954. The hearing will be held in the Parole Board Room at 20537.

At this hearing you may have a representative who will be permitted to make a statement related to your case at the end of the hearing or you may waive representation and present your own case at the institutional hearing.

You will be advised of the decision in your case, in writing, within 15 working days of the hearing (except in emergency situations). If parole is denied, the reasons for the denial also will be given in writing.

Within 30 days after the entry of the order, you may request an appeal to the Parole Board's Regional Member. Your request must be in writing and filed with the Chief C&P. Forms for this request are available at the Chief C&P's office in your institution.

Your appeal request will be considered by the Regional Member who may (1) send your case back to the institution for a rehearing, (2) schedule an appeal hearing at the regional level, (3) modify the decision, or (4) affirm the order. You will be afforded an opportunity to appear only at an institutional rehearing. However, if an appeal hearing at the regional level is granted, you may have a representative speak for you or you may request a regional appeal on the record only.*

If you have further questions concerning the procedures, consult your caseworker.

* The above provisions do not apply to en banc cases. An appeal may be taken in en banc cases within 30 days from entry of the Regional Board Member's decision to the National Appellate Board. The National Appellate Board may affirm the order or schedule an appeal hearing before the next meeting of the full Board. If an appeal hearing is granted, you may have a representative speak for you or you may request an appeal on the record only.

12-14-73
Date received

Raymond O. [Signature] 24577-136
Signature and Register No.

ORIGINAL TO FILE JACKET - COPY TO PAROLE APPLICANT

I certify a copy
has been mailed
to the U.S.A. for the
E.D. of N.Y. and the
Dept. of Justice,
Washington D.C. on
8/12/74.

Physician
Gimbo